No. 250.

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Supreme Court of the United States.

OCTOBER TERM, 1901.

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THE PINE RIVER LOGGING AND IMPROVEMENT COMPANY, A CORPORATION; JOEL B. BASSETT AND WILLIAM L. BASSETT, COPARTNERS AS J. B. BASSETT AND COMPANY, AND JOHN S. PILLSBURY AND CHARLES A. SMITH, COPARTNERS AS C. A. SMITH AND COMPANY, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PLAINTIFFS IN ERROR.

ALSO COPIES OF TWO OPINIONS BY THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT ON FORMER HEARINGS OF THE CASE IN THAT COURT.

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vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The writ of error in this case is brought to review a judgment of the circuit court of appeals for the eighth circuit, affirming a judgment of the circuit court for the district of Minnesota in favor of the United States against the plaintiffs in error for $88,269.94.

The suit was an action brought by the United States against a corporation called The Pine River Logging and Improvement Company (hereinafter called the Logging Com-

pany), and the firms of J. B. Bassett and Company and C. A. Smith and Company, to recover damages for an alleged wrongful entry by the defendants upon an Indian reservation and the cutting and removal of certain pine timber therefrom.

By an act of Congress approved February 16, 1889 (25 Stat. at Large, page 673), it was provided:

"That the President of the United States may from year to year in his discretion, under such regulations as he may prescribe, authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen, on such reservation or allotment for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this act, then in that case such authority shall not be granted."

The regulations prescribed by the President under this act will be found on pages 112 and 113 of the record. They provided, among other things, that in all cases a Government agent should "go into the woods with the loggers and superintend and direct their labors;" that the logs should be "cut and banked, or otherwise made ready for sale by the Indians under the supervision and direction of the agent;" and that 10 per cent. of the gross proceeds derived from the sale of the logs should "go to the stumpage or poor fund of the tribe, from which the old, sick, and otherwise helpless may be supported."

The first count of the complaint charges that in December, 1891, one George Lydick, with the consent and at the request of all the defendants, wrongfully entered upon lands owned by the United States which were part of an Indian reservation, and that between December 15, 1891, and April 13, 1892, Lydick wrongfully cut down a large number of trees on the land in question, which he delivered to the de-

fendants; that these logs were marked with certain specified letters and symbols; that the defendants drove and boomed the logs to Minneapolis, where they converted them into over four million feet of lumber; that the value of the lumber was over $85,000; and that the defendants did then and there convert the same to their own use (2–3).

The second, third, fourth, fifth, sixth, seventh, and eighth counts of the complaint are like the first, except that they name different persons as having cut the timber for the defendants instead of Lydick. The quantity of lumber and the value of it differs in the several counts (3–10).

The ninth and last count is like the first, except that it contains no averment that the logs were marked (10).

The Logging Company, J. B. Bassett and Company, and C. A. Smith and Company filed separate answers. The answer of the Logging Company admitted that under contracts entered into by it under the act of February 16, 1889, with the Indians named in the first, second, third, fifth, and sixth counts of the complaint, and under the supervision of the United States Indian agent having charge of the reservation on which the timber was situated, the Indians named respectively cut from the reservation and delivered to the Logging Company timber to the amount specified in the answer to the respective counts (14–20). As to the fourth, seventh, and eighth counts, the Logging Company denied all the allegations contained therein, except that on information and belief it admitted that during the time specified the defendant J. B. Bassett and Company entered into contracts with certain Indians for pine timber which was cut and delivered to that firm under its contracts (20). The Logging Company denied all the allegations of the ninth count of the complaint (20). As to all the counts, the Logging Company further set up in its answer that the United States, through one J. O. Warriner, its duly authorized agent for the purpose, took possession of all the logs belonging to the Logging Company, claiming

that a portion of them had been cut from green timber; that at the same time the Government seized a large quantity of timber which had been cut and delivered to the defendant J. B. Bassett and Company; that the Logging Company and Bassett and Company had made arrangements for driving the logs which they respectively had received under their several contracts, and that thereupon a contract was entered into between the United States on the one hand and the Logging Company and J. B. Bassett on the other, a copy of which contract is annexed to the answer, which provides in substance that the defendants might drive the logs to Minneapolis without affecting the possession of the United States or the interest of any of the parties in the logs (20–23).

The answer further averred that the defendants drove the logs to Minneapolis in accordance with the last-mentioned contract, and that afterwards the Logging Company gave to the United States a bond, with sureties, in the penal sum of $75,000, which recited the foregoing facts and recited also that it was considered important by both parties that the logs should be driven to the mill and manufactured into lumber for the interest of all concerned, and provided that if the Logging Company should pay any judgment that might be rendered against it on account of the premises, the obligation should be void (21–22). It was next set up in the answer that the United States had accepted the bond in lieu of the logs and that, relying upon said acts of the complainant, the Logging Company had disposed of the logs to others. It was then again specifically set up in the answer, as to the fourth, seventh, and eighth counts of the complaint, that the claim of the United States was solely against J. B. Bassett and Company, and not against the Logging Company; that the claim set up in the first, second, third, fifth, and sixth counts was solely against the Logging Company, and that there was therefore a misjoinder of causes of action in improperly uniting in one complaint causes of action affecting

solely the Logging Company and other causes of action affecting solely the firm of J. B. Bassett and Company (22). Under the Minnesota Code this plea in abatement was properly pleaded with the defense to the merits (Wenzell's Statutes of Minnesota, 1894, sec. 5239; Page *vs.* Mitchell, 37 Minn., 368).

The answer of Bassett and Company was similar to that of the Logging Company, except that Bassett and Company admitted receiving under contracts made under the act of February 16, 1889, only the timber referred to in the fourth, seventh, and eighth counts of the complaint (27–30). As to the first, second, third, fifth, and sixth counts, Bassett and Company averred on information and belief that the Logging Company had the contracts and received the timber referred to in those counts (30). Bassett and Company, like the Logging Company, denied all the averments of the ninth count (31). Bassett and Company further averred that after the logs had been seized they entered into a contract with the United States for driving the logs which they had received to Minneapolis, without affecting the possession of the United States or the interest of either of the parties in the logs (33), and that after the logs had been taken to Minneapolis they gave to the United States a bond in the penal sum of $26,000, which recited the history of the logs and the controversy that had arisen in regard to them, and provided that it should be void if Bassett and Company should satisfy any judgment that might be obtained against them on account of the premises (35).

Smith and Company denied all the averments of the complaint referring to them, except that they admitted that the Logging Company delivered to them, to be manufactured into lumber, a certain amount of the logs described in the complaint, the value of which did not exceed $132.04. Smith and Company also set up that if the United States had any cause of action against them such cause was separate and distinct from any claim that the United States had

against any of the other defendants, and that therefore there was a misjoinder of causes of action (25–26).

The United States demurred to certain parts of the answers of Bassett and Company and the Logging Company (37–38). Though the record does not state what action was taken upon these demurrers, they must have been overruled or abandoned, because the United States subsequently replied to the several answers of the respective defendants (40–43).

In its reply, the United States admitted that the Logging Company and Bassett and Company had each, under the provisions of the act of February 16, 1889, entered into contracts with certain Indians, but averred that all the logs cut under some of the contracts and a large proportion of the logs cut under the other contracts were cut from pine trees which were alive and standing (50–52). All the contracts authorized the cutting of only "dead and down timber."

This case has been three times before the circuit court of appeals for the eighth circuit. A judgment was originally rendered in favor of the defendants upon the pleadings, on the ground apparently that the remedy of the Government was on the bonds given when the logs were surrendered to the defendants. The circuit court of appeals reversed this judgment, holding that neither of the bonds became available to the United States until a judgment had been obtained in its favor. It was also held that there was no misjoinder on the face of the complaint, because it averred that all the defendants had unlawfully received all the logs and converted them to their use. (See U. S. *vs.* Pine River Logging and Improvement Company, 78 Fed. Rep., 319.) A copy of the opinion of the court on this first appeal is appended to this brief as Appendix "A."

When the case was sent back to the circuit court there was a trial which resulted in a verdict and judgment in

favor of the defendants. The circuit court of appeals reversed this judgment also on exceptions taken by the United States at the trial. (See United States *vs.* Pine River Logging and Improvement Company *et al.*, 89 Fed. Rep., 907.) A copy of the opinion of the court on the second appeal is appended to this brief as Appendix "B."

The principal points covered by this opinion are that the contractors were limited to the quantities of timber specified in their respective contracts, with allowance only for slight variations from those quantities, and that the fact that the cutting was superintended by a Government agent did not affect the claim of the Government for any logs cut from green timber, or to logs cut from dead and down timber in substantial excess of the quantities specified.

The second trial of the case resulted in a verdict, by direction of the court, in favor of the United States for the sum of $88,269.94 (66). This result was reached (109, 110) by deducting from the total quantity of timber which the Logging Company and Bassett and Company in their answers admit was received by them under the contracts, to wit, 17,600,260 feet, the 2,750,000 feet specified in the contracts, and by fixing the price for the difference between these two sums at $4 per thousand feet, which was the lowest estimate of the value of the timber when it was seized by the Government given by any of the defendants' witnesses (107). This gave as the sum which the defendants were liable to pay the sum of $59,401.04. To this sum interest was added from May 31, 1892. There was also a judgment for costs in the sum of $5,320.66 (71).

To review the judgment entered on this verdict, the case was taken by the defendants to the circuit court of appeals, where the judgment was affirmed (136).

On this occasion the court delivered no opinion, possibly for the reason that it considered that the questions raised by the exceptions taken by the defendants at the second trial were sufficiently covered by the opinions filed in the case

when it was before the court on the former appeals; or, more probably, because the case had been before that court twice before and it was thought wise to allow it to come to this tribunal for determination of the questions involved in the former hearings.

With the petition for the allowance of a writ of error from this court to review the last judgment of the circuit court of appeals there was filed an assignment of errors (~~125~~) (128) which followed the chronological order of events at the trial. In this brief these assigned errors will be arranged in a different order, and where two or more relate to the same point they will be consolidated.

ASSIGNMENT OF ERRORS.

The circuit court of appeals erred:

I. In sustaining the action of the circuit court in instructing the jury to render a verdict for the United States in the sum of $88,269.94 (66), because this instruction required the Logging Company to pay the obligations of Bassett and Company, and required Bassett and Company to pay the obligations of the Logging Company, and required C. A. Smith and Company to pay the obligations both of the Logging Company and Bassett and Company, when there was no evidence in the case to justify the court in holding any of the parties liable for the obligations of the others, the evidence in that behalf at the most making this a question of fact for the jury.

II. In sustaining the action of the circuit court in instructing the jury to render a verdict for the United States in the sum of $88,269.94 (66), because on the evidence the court should have instructed the jury—or should at least have left it to the jury to determine the question—that under the contracts with the Logging Company and Bassett and Company on the one hand and the Indians on the other, as

those contracts had been construed and acted upon by all the parties in interest (including the United States), the Logging Company and Bassett and Company respectively had a good title to all the dead and down timber which was delivered to them by the Indians under the contracts, without regard to the specific amount of timber mentioned in the several contracts.

III. In sustaining the action of the circuit court in instructing the jury to render a verdict for the United States in the sum of $88,269.94 (66), because even if the defendants were jointly liable for all the timber cut and delivered in excess of the aggregate amount specified in the contracts, the proper measure of damages was not the value of the logs when they were seized by the Government, but the value to the Government of the timber before the Indians or the contractors by their labors had added to that value.

IV. In sustaining the action of the circuit court in instructing the jury to render said verdict, because in any event the defendants were entitled to a credit of the amount paid to the United States for stumpage on the 14,850,260 feet of timber included in the verdict (110), amounting, with interest, to about $9,500.

V. In sustaining the action of the circuit court in excluding (101) the telegram of March 16, 1893 (123), from the acting Commissioner of the General Land Office in Washington to the Logging Company at Minneapolis, in the following words:

"Have accepted bond offered by you in lieu *in* logs cut under contract with certain Chippewa Indians, which logs were seized and held by the Government special agent. Warriner has been directed to release the logs",

and in excluding (101) the letter (123) of said Warriner as special agent of the General Land Office, dated March 18,

1893, addressed to the secretary of the Logging Company, in the following words:

"DEAR SIR: I am in receipt this day of the following instructions by telegraph from the honorable Commissioner of the Gen. Land Office, dated Washington, D. C., March 16th, 1893.

"'Bonds have been accepted in lieu of logs seized by (——) which were cut by Chippewa Indians under contracts with Pine River Logging and Improvement Co. and J. B. Bassett & Co. Release the logs to said parties' * * *

"Therefore, in compliance with said instructions, the said logs are released to you, subject to provisions contained in bonds in lieu thereof.

"Please acknowledge receipt hereof by return mail, and oblige.

"Yours respectfully, J. O. WARRINER,
"*Special Ag't, G. L. O.*"

VI. In sustaining the action of the circuit court in excluding the answer of the witness Charles A. Smith, on his direct examination as a witness on behalf of the defendants, to the question "Was anything said by the Indians who saw you as to the amount of dead timber on the reservation that winter?" and in ruling out the evidence offered by the defendants through said Smith, in answer to said question, that he had had a conversation with certain of the Indians named in those contracts, and that the Indians informed him that there was a large amount of dead and down timber on the reservation that could be cut (98–99).

VII. In sustaining the action of the circuit court in permitting the witness I-Ah-Bance, over the objection of the defendants' counsel, to testify in answer to the question, "Were you paid by the owner; did you get any profit out of the work that winter?" that he did not (85).

VIII. In sustaining the action of the circuit court in permitting the plaintiff's witness, Edward L. Warren, on his

direct examination, after he had said that on a visit to the camp of one of the Indian contractors he had a conversation with Mr. Galbraith with reference to the trees they were cutting, to testify over the objection of the defendants' counsel, and in reply to the question, "What was the conversation?" as follows:

"I said to Mr. Galbraith that they were cutting—I says, 'You are cutting green timber here.' He says, 'I know it;' and I says, 'You will get in trouble if you ain't careful.' He says, 'There is others cutting.' He says, 'I don't see any reason why I shouldn't cut some.' I think those are the words" (87).

IX. In sustaining the action of the circuit court in excluding on plaintiff's objection an answer by the defendants' witness, Charles A. Smith, to the following question:

"As regards such a bunch of timber as mentioned in your last answer, what was the meaning of the term 'dead timber,' as generally and commonly used in the State of Minnesota by lumbermen with reference to lumbering and logging operations?"

And in excluding the evidence offered by the defendants in the same connection by the same witness, that at the time the contracts between the respective defendants and the Indians involved in this suit were entered into, and for many years prior thereto, the term "dead and down" timber, as generally and commonly used in the State of Minnesota by lumbermen with reference to lumbering and logging operations and logging contracts, was understood to mean and was used as meaning a bunch or body of pine trees the great proportion of which had been injured by fire, so that they were dead or would die within a short time, although a small proportion of the trees scattered through the bunch were practically uninjured by fire (103, 104).

X. In sustaining the action of the circuit court in enter-

ing judgment against the defendants for costs in the sum of $5,320.66 (76, 77).

XI. In affirming the judgment of the circuit court and in not reversing the same and directing a new trial.

ARGUMENT.

I.

The judgment should be reversed because it requires the Logging Company to pay the obligations of Bassett and Company, and requires the firm of Bassett and Company to pay the obligations of the Logging Company, and requires C. A. Smith and Company to pay the obligations both of the Logging Company and Bassett and Company.

Copies of the contracts of the Logging Company and Bassett and Company with the Indians were filed in the court below as exhibits to the reply of the United States to the respective answers of the Logging Company and of Bassett and Company (45–47–53–57). It will be seen that the Logging Company entered into contracts with three Indians, and Bassett and Company entered into similar contracts with two other Indians. Each contract provided that the logs cut under it should have a certain bark-mark and a certain stamp mark or marks, both the bark-marks and the stamp-marks provided for by the Logging Company's contracts being entirely different from those specified by the Bassett and Company contracts.

As has been seen, in the complaint no reference is made to the contracts, and all the defendants are charged with having employed each of the Indians named in the several counts and having received all the timber that was cut; but in their answers both the Logging Company and Bassett

and Company set up their respective contracts, and each of them averred that it had nothing to do with the contracts of the other (20–30).

The firm of Smith and Company in their answer denied all the allegations of the complaint, except that it admitted that the Logging Company had delivered to it some of the logs, which Smith and Company had manufactured into lumber and disposed of in the ordinary course of business, the lumber so disposed of being worth not more than $132.84 (25).

The facts in the case indicate that from the beginning all the parties treated these contracts as they appeared to be on their face, separate and distinct from one another. It is true that by an instrument, the date of which nowhere appears, the Logging Company and Bassett and Company employed Clark Clay to take all the logs landed under these contracts and drive them "below Brainerd dam" (115, 116), but, as the marks upon the logs necessarily indicated to whom each log belonged, there was nothing in this contract, it is submitted, which would justify the Government in treating the Logging Company as in possession of the logs of Bassett and Company and liable therefor, and Bassett and Company as being in possession of the logs of the Logging Company and liable therefor. Indeed, there was no evidence that the logs of the several owners were mingled together.

When the final settlement with the Indians was made, the amounts due each of the Indians who had entered into contracts with the Logging Company, and of the two Indians who had entered into contracts with Bassett and Company, were kept separate and distinct from each other, the amount due under the Logging Company's contracts being ascertained to be $17,958.65, and the amount due under the Bassett and Company contracts being $3,061.15 (122). Bassett and Company drew their check for this sum of $3,061.15 to the order of F. C. Gerhardt, who was in their employ (104), and Gerhardt indorsed it over to Shuler, the Indian agent, who

collected it (120) and gave Bassett and Company his receipt therefor (121). The Logging Company paid to Shuler the balance due from it of $17,958.65 and received his receipt therefor (120). On the same day that these payments were made Shuler, as the Indian agent of the United States, directed the surveyor general of the second Minnesota district to transfer to Bassett and Company the log-marks which designated the logs belonging to Bassett and Company, and to the Logging Company the bark-marks and stamp-marks designating the logs belonging to it (123, 124).

When the logs were finally surrendered by the United States to the defendants for the purpose of having them manufactured into lumber, the Logging Company and Bassett and Company each gave to the United States a separate bond, the bond of Bassett and Company being in the penal sum of $26,000 (35), while the bond given by the Logging Company was in the penal sum of $75,000 (21). The bond given by Bassett and Company recited, among other things, that that firm "did, in the year 1891, enter into divers contracts with sundry Indians of the Chippewa nation;" that certain logs had been cut by the Indians named in said contracts, and that there had arisen between the United States and Bassett and Company a controversy regarding the logs. The condition of this bond is that if Bassett and Company shall "pay or cause to be paid, or satisfy or cause to be satisfied to the United States of America any judgment that may be rendered against the above-named principal (Bassett and Company) in any form of action or suit which may be brought by the United States against said above-named principal *on account of the premises hereinbefore recited*," the obligation should be void (35, 36). The entire bond given by the Logging Company does not appear in the case *verbatim*, but all that is material in it is set forth in the answer of the Logging Company (21, 22) as is expressly admitted by the reply of the United States to that answer (44). This bond is in the same form as that of

Bassett and Company. By it the Logging Company was to pay any judgment that might be obtained against it by the United States "*on account of the premises hereinbefore recited,*" and the premises refer only to the Logging Company's contracts and not to those of Bassett and Company.

From this review of the admitted facts it is apparent that from the time the contracts were originally entered into by the Logging Company and Bassett and Company respectively until the logs were finally released by the Government after their seizure, the parties understood that certain of the logs were the property of the Logging Company and certain others were the property of Bassett and Company.

As to C. A. Smith and Company, William L. Bassett of the firm of Bassett and Company testified that "the logs cut under the contracts were equally divided between C. A. Smith and Company and J. B. Bassett and Company, and not according to the amounts named in the contracts" (108). Charles A. Smith, of the firm of Smith and Company, was also secretary of the Logging Company (96). And Smith and Company in some respects acted as the financial agents of the Logging Company in paying the Indians and in the final payment of $17,958.65 to the U. S. Indian agent (118, 119). All this indicated intimate relations between the three defendants, but it was far from being sufficient to justify the court in holding *as matter of law* that each of the parties was responsible for all the acts of the others in relation to these contracts.

II.

The court should have instructed the jury—or should, at least, have left it to the jury to determine the question—that under the contracts between the Logging Company and Bassett and Company, respectively, on the one hand, and the Indians, on the other, as those contracts had been construed and acted upon by all parties in interest, including the United States, the Logging Company and Bassett and Company, respectively, had a good title to all the dead and down timber which was delivered to them by the Indians under the contracts, without regard to the specific quantity of timber mentioned in the several contracts.

By the contract between the Logging Company and the Indian, William Fairbanks, the latter agreed to cut, haul, and deliver "*about* five hundred thousand feet of pine saw-logs, to be cut on the Indian reservation from dead and down timber" (53). The other contracts to which the Logging Company was a party used the same phraseology, the number of feet of logs only being different (55–57). By the contract between Bassett and Company and the Indian, Scho-Cag-e-Sic, the latter agreed to cut, haul, and deliver "two hundred and fifty thousand feet, *more or less*, of pine saw-logs, to be cut on the Indian reservation from dead and down timber" (45). Their contract with the Bongas contains the same language (47).

It is settled in this court that the words "more or less" or "about," when used in relation to a quantity of goods or articles to be delivered under a contract, will, under some circumstances, be held to limit the quantity to "slight and unimportant" differences between the amount delivered and the amount specified by the contract, but that under other circumstances they may practically neutralize the words specifying exact quantities. Thus, in Norrington *vs.* Wright, 115 U. S., 188, it was held that under a contract

to ship *about* one thousand tons of iron rails per month during a certain period the sellers were bound, during that period, to ship approximately one thousand tons each month; while in Brawley *vs.* U. S., 96 U. S., 168, it was held that a contract by which the Government agreed to purchase 880 cords of wood, more or less, was satisfied by the purchase of only forty cords, because other parts of the contract indicated that it was to be left to the post commander at the place of purchase to determine how many cords would be required.

This court has also repeatedly held that where both of the parties to a contract by their subsequent conduct have given it a construction different from that which the law might have given it the courts will adopt that construction. In Steinbach *vs.* Stewart, 11 Wall., 576; Insurance Company *vs.* Dutcher, 95 U. S., 273; Topliff *vs.* Topliff, 122 U. S., 131; and Lake Shore R. Co. *vs.* Prentiss, 147 U. S., 99, this was expressly determined.

In Chicago *vs.* Sheldon, 9 Wall., 54, the court said: "In an executory contract and when its execution necessarily involves a practical construction, if the minds of both parties concur there can be no great danger in the adoption of it by the court as the true one."

Perhaps the strongest case in this connection is the District of Columbia *vs.* Gallaher, 124 U. S., 505. In that case Gallaher had entered into a contract to build a large sewer in Washington in accordance with certain plans and specifications. An apparent departure from the plans was made which resulted in the board of audit, before which the contractor's accounts came for settlement, deducting from the amount due him under the contract the sum of over $35,000. The contractor brought suit in the Court of Claims to recover this sum, and obtained a judgment in his favor, which was affirmed by this court, the ground of the decision in favor of the claimant being thus stated by Mr. Justice Matthews, who delivered the opinion:

"The work as actually done was done under the direction and supervision of the District engineer and was performed in accordance with the plan and sample which was supposed and understood to be what was required by the contract, and to be paid for at the contract price. We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done, must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

In the present case the statute under which the cutting was done; the correspondence between the Secretary of the Interior and the President on the subject; the regulations which the President adopted for carrying the act into effect; and the conduct of all the parties concerned in these particular contracts, and especially the conduct of the United States, tend to show that the proper construction of the contracts is that they authorized the removal of all the dead and down timber on the public land described in them.

The statute empowers the President to authorize the Indians residing on the reservation "to fell, cut, remove, sell or otherwise dispose of *the dead timber standing or fallen on such reservation.*" The several communications of the Secretary of the Interior to the President, dated respectively October 15, 1890, November 21, 1890, and November 28, 1890 (111 to 115), which seem to have been written while some of these very contracts were pending, clearly look to giving the Indians the right to appropriate for their own benefit all the dead and down timber on the reservation mentioned. These letters show that arrangements had been made to remove the Chippewa Indians from one reservation to another; that they were poor and discontented; and that to give them this privilege would be a benefit to them and would reconcile them to the removal which the Government had in contemplation. In the latest of the letters of the Secretary of the Interior to the President he said:

"I am of the opinion that the Red Lake Indians should be allowed *to cut and dispose of the dead and down timber on their ceded lands* during this season" (115). And the approval of the President endorsed upon this letter suggests that "the greatest care must be taken to *limit the cutting to dead and down timber*" (115).

The Logging Company contracts all contain the provision that the company shall pay the stipulated price per thousand feet *for all logs so cut*, without restriction to the quantities specified in another part of the contracts (53, 55, 57).

In District of Columbia *vs.* Gallaher, *supra*, the court lays great stress on the fact that the work for which compensation was claimed had been done under the direct supervision of the District engineer. The regulations adopted by the President under the act of February 16, 1889, expressly require that all the cutting shall be superintended and directed by an officer to be appointed by the Secretary of the Interior (112). In all the contracts involved in this suit the clause referring to the quantity of timber to be cut provides that the cutting shall be done "under the supervision of the United States Indian agent, or his deputies," and that the payments shall be made either to the agent or to the Indians under his supervision (4[illegible]). And as a matter of fact it is conceded here by the United States that all the work under these contracts was done under the superintendence of Tristram W. Tidd, the Government superintendent, who personally directed what timber should be cut (82). And when the timber had all been cut and a final settlement was made with the Indians, the amounts found to be due by the Logging Company and Bassett and Company, respectively, were paid directly to Shuler, the United States Indian agent (120, 121). With the contracts before him specifying the price to be paid per thousand feet to the Indians for cutting the timber, the agent, when he received the balances, knew exactly the quantity of timber that had been cut under each of the contracts. This was shown

further by the statement which was submitted to him at the time of the settlement (104, 109, 122). With this full information as to the quantity of timber that had been cut, the Indian agent not only received from the contractors in cash the balance due under the contracts, but at the same time gave to the surveyor general of the district in which the logs were situated a formal order for the transfer of the log-marks (and thereby the title to the logs) to Bassett and Company and the Logging Company, respectively (123, 124).

And even when the Commissioner of the General Land Office directed the seizure of the logs and took the other steps which led to the present litigation, he, by necessary implication, assumed that there was no objection to the quantity taken, the only controversy between him and the Logging Company and Bassett and Company being whether a part of the logs had not been cut from green timber. This is shown in many ways. The bonds which were given by the Logging Company and by Bassett and Company, when the timber was turned over to them to be manufactured into lumber, recited—

"Whereas a controversy afterwards arose between said principal and the United States, as to whether the logs so cut were cut from dead and down timber, or as to whether the same were in great part cut from green timber; and whereas *in consequence of such controversy* said logs, while in the possession of said principal, were seized" (21–35).

In considering the effect of the language in the bonds showing what, when they were given, was the only controversy between the United States and the contractors, it is important to remember that about a year before the bonds were executed and approved by the General Land Office, in Washington, the Commissioner of the General Land Office had been informed by his own agent, whom he had sent to the lands to make an investigation, that the quantity of logs cut *from dead and down timber* was from five to eight million square feet, or from two to five million

feet more than the aggregate amounts specified in the several contracts. J. O. Warriner testified at the trial, on behalf of the Government, that about April 7, 1892, he was instructed by the Commissioner of the General Land Office to make an investigation; that he made a report to the Commissioner and afterwards and about May 14 returned to the reservation, pursuant to instructions, and seized and took possession of the logs (93). With his report he had submitted to the Commissioner a schedule showing his estimate of the number of feet of green logs cut under each of the contracts, the number of feet cut from dead timber, and the number of feet cut from "stump-burnt" timber (94–117). In this statement the quantities entered under the head of "No. of feet dead" (which Warriner testified covered timber that he considered "unquestionably dead or blown down," page 93) aggregate 4,832,635 feet, or over 2,000,000 more than the aggregate amount specified in the contracts. Warriner further testified that the quantities entered under the heading "No. of feet stump burnt" included what "might possibly be considered dead timber" (93). He explains that when a fire has passed through a tract of timber a question will arise, as to many of the trees, whether they are so injured that they will die therefrom, and that this is a "matter of judgment and discretion as to which experts may differ, and often do differ" (94). The quantities in this doubtful column (excluding 9,700 feet cut and not removed) aggregate 3,480,689 feet. If we add together the quantity of logs which Warriner's statement showed had been cut from dead and down timber and the quantity which the statement showed might be included in that category the total is 8,313,324, or more than three times the aggregate number of feet specified in the contracts. It was with this information before him in writing that the Acting Commissioner of the General Land Office approved the bonds which set forth that the controversy between the United States and the contractors was whether the logs were in great part cut

from green timber, and that in consequence of *that* controversy the Government had seized the logs.

The complaint in this case is so general that it throws no light on this question. But in its answer the Logging Company stated that the United States had taken possession of the logs, "claiming that a portion of said logs so cut by said Indians was green timber, and not dead and down timber" (20). In its reply to this answer the United States admits the seizure and makes no question that the reason for the seizure is correctly set forth in the answer (52). The answer of Bassett and Company contains a similar averment (31).

It is clear, therefore, that from the making of the contracts down to the time the pleadings in this case were closed it was understood by the contractors, by the Indians, by the Government inspector who superintended the cutting, by the Indian agent who had general charge of the operation, and by the Commissioner of the General Land Office himself, that *any* dead and down timber on the land specified in the contracts might be lawfully cut by the Indians and delivered to the contractors.

There was nothing unreasonable or injurious to the Government in this view of the matter. Dead or down timber, if not utilized in some way, would rot where it stood or where it lay. It would have been a dog-in-the-manger policy for the Government to make no use of it, and at the same time keep the Indians from getting any benefit from it.

The history of the case indicates that the United States pursued these contractors under the belief that they, in collusion with the Indians and the Indian agent and his subordinates, had been taking away a vast quantity of good green timber, and that when at the first trial it was seen that this contention could not be supported as to most of the timber the representatives of the Government shifted their ground and took a position utterly inconsistent with the pleadings, the bonds, and the general course of conduct of all the parties concerned.

III.

Even if the defendants were jointly liable for all the timber cut and taken away in excess of the aggregate amount specified in the contracts, the proper measure of damages was not the value of the logs when they were seized by the Government, but the value to the Government of the timber before the Indians or the contractors by their labors had added to that value.

The measure of damages in an action in the nature of an action of trover for timber wrongfully removed from the public lands was considered by this court in Wooden Ware Company *vs.* U. S., 106 U. S., 432. In that case certain timber had been cut and removed from an Indian reservation in the State of Wisconsin. As stated in the opinion of the court, "this timber was knowingly and wrongfully taken from the land by Indians and carried by them some distance to the town of Depere and there sold to The E. E. Bolles Wooden Ware Company, the defendant, which was not chargeable with any intentional wrong, or misconduct, or bad faith in the purchase." The rule of damages under such circumstances was thoroughly presented by counsel and carefully considered and determined by the court. It was held that where the taking is the result of inadvertence and mistake, and the wrong was not intentional, the value of the timber when it was first taken must govern; that in such a case, if the conversion sued for was after value had been added to the property taken by the work of the defendant, he should be credited with the addition, and that if the taking is wrongful or willful the measure of damages is the value of the property at the time of the conversion, no allowance being made to the purchaser for the additional value which has been given to the property by his labor. It was further held that where,

as in the Wooden Ware case, the defendant was an innocent purchaser from a willful trespasser, he would be in no better position than his vendor. The present case has features which differentiate it from the Wooden Ware Company case, and perhaps from any other case that could be cited. The timber here involved was cut and taken from Government land by Indians, who were paid for their work by the defendants under contracts entered into before the cutting was begun. If that were all it might be said that the contractors themselves cut the timber on the principle that what one does by an agent he does himself; but these contracts were entered into under authority of an act of Congress, and were approved by the Secretary of the Interior, and the cutting and removing was all done under the superintendence of a Government inspector and under the general direction of the Indian agent on the spot. The money that was paid to the Indians was paid by the contractors to the Indian agent and through him disbursed to the loggers, except the 10 per cent. "stumpage" which was reserved and applied by the Government to the support of the poor of the tribe to which the loggers belonged. It is hard to see under such circumstances how any claim could reasonably be made that the cutting and removal was wrongful or willful, unless it should be charged that there was collusion between the contractors, on the one hand, and the superintendent and agent, or both, on the other. There is no suggestion anywhere in the record of any such charge, and as, in the absence of evidence to the contrary, innocence is to be presumed, the only legitimate explanation of what happened, assuming that the contracts limited the quantity of timber that might properly be taken to the quantities specified in the contracts, is that the contractors, the Indians, the superintendent, and the agent all made an honest mistake and understood the amount specified in the contracts with the qualifying words "about" or "more or less" to be simply an estimate as to the amount of

dead and down timber that was on the land described in the contracts.

If it is held that the Indians on their own account, and not merely as agents of the contractors, cut and removed the timber and sold it to the contractors, then under the doctrine of the Wooden Ware case the question would be whether the Indians acted in good faith. Whether they did or did not, the purchasers would stand in their shoes. On the other hand, if the Indians are to be construed merely as the agents of the contractors, then the question would be whether the contractors themselves acted in good faith. But, whichever view is taken of the matter, the result will be the same, because there is no evidence tending to show that either the Indians or the contractors did not act in good faith, and the fact that everything that was done was done not merely with the approval, but under the express direction of Government officers whose integrity in the matter is not assailed, would seem to be conclusive that intentional wrong-doing in the matter of the quantity of timber cut and removed is not to be imputed either to the contractors or to the Indians.

In this connection we ask the court to consider what has been said with reference to the next preceding point in the case. If what is there urged does not satisfy the court that a proper construction of the contract, in view of its language and the conduct of all the parties in interest, is that *any* dead and down timber on the lands described in the contracts might be removed, it will, we think, at least lead to the conclusion that laymen, and especially such laymen as the Indians mentioned in these contracts, might reasonably have come to the conclusion that that was what the contracts meant.

The learned judge who presided at the first trial of this case, after hearing full argument by counsel for the United States, reached the conclusion that the construction of the contracts here contended for was the correct one. It is not unreasonable to presume that the contractors, the Indians,

and the agents of the Government might honestly have understood the matter in the same way.

If the quantity of dead and down timber on the land had turned out to be materially less than that specified in the contracts, could it have been successfully contended that the contractors were entitled to have their profit on the deficiency made good to them?

In this connection it must be remembered that the question is whether the contractors, by showing their good faith in the matter, were entitled to a reduction in the measure of damages as to *any* of the timber cut in excess of the precise amount specified in the contracts. Yet it must be obvious that exact compliance to the letter with these amounts was practically impossible; and certainly no one cutting or receiving timber under like contracts and under the circumstances which surround this transaction could be accused of intentional wrong-doing in receiving from the Indians, under the approval of the Government, through its agents, a few thousand feet more than the quantities specified in the contracts.

It is submitted with great respect that the rule laid down in the Wooden Ware case should not be extended. As applied in that case, it required that there should be paid to the owner of property by one who was innocent of any wrongful act or intent in the matter, a sum far greater than the value of the property of which the plaintiff had been deprived. The modern authorities seem to lean to the doctrine that one whose property has been taken by another without fraud, force, or malice is entitled to recover only what he has lost.

In Cobbey on Replevin, section 910, it is said:

"If the original owner recover the value of his property at the time it is taken, with interest, costs and expenses, it will, in most cases, be a proper and correct measure of damages. Where a recovery of the value of property is sought in replevin, the usual measure of recovery is the value before

the property was improved by defendant's labor and skill, and this, even where it was taken knowingly and wilfully, without color or claim of right, except where such taking was accompanied by special circumstances (as malice or insult) which would justify exemplary damages, and this is to be estimated by the best means available."

So in Wells on Replevin, section 617, it is said:

"The rule has been stated with much force and clearness, as follows: When the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If the raw material has, after appropriation and without such wrong, been changed by the manufacturer into a new species of property, as grain into whiskey, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action or limits the recovery to the value of the original articles. But when the defendant has been guilty of any force or fraud to wrongfully deprive the plaintiff, the rule, as stated, does not apply, and the law gives the owner the entire property, without deduction for the increased value which the trespasser's labor has given it. The intention of the law in these cases is to do justice to the parties."

Indeed, the same court of appeals from which the case at bar comes to this court said, in Durant Mining Company *vs.* Percy, 93 Fed. Rep., 166, that—

"One who unintentionally and in the honest belief that he is lawfully exercising a right which he has enters upon the property of another and removes his ore, his timber, or any other valuable appurtenant to his real estate, is liable in damages for the value of the ore, timber or other thing in its original place, and for no more."

In this case the Government has recovered compensation for the logs at the rate of $4 per thousand feet—their value after the timber had been cut, hauled to the water, and

driven to Winnibegoshish lake and neighboring waters on their way to Minneapolis. There was evidence tending to show that this timber, before any value was added to it by the labors of the Indians or the defendants, was worth only from twenty-five to fifty cents per thousand feet (101). The 10 per cent. of the contract payments reserved by the Government for "stumpage" shows that the United States considered the stumpage value to be from forty to forty-five cents per thousand feet.

The defendants, therefore, after having once paid the Indians (through the United States) for the timber are now required to pay again to the United States from eight to sixteen times its value to the Government. And this in face of the fact that if the timber had not been cut under these contracts (assuming, as we must here, that it was all dead or down timber) it would in all probability have become valueless from natural decay (108, 109), and neither the Indians nor the Government would have received any benefit from it.

The court in this case is not hampered by technical rules as to the proper measure of damages growing out of the form of the action. Common-law pleading has long been abolished in Minnesota. (See Wenzell's Statutes, chapter 66, sec. 1.)

Even where the common law obtains there is a great divergence in the authorities on the question whether, in an action of trover, a defendant who has taken timber, or ore, from the land of another, under the erroneous impression that he had the right to take it, can be allowed a deduction from the value of the timber, or ore, of the added value given it by his labor. An excellent discussion of the difference, in this regard, between an action of trover and an action of trespass *quare clausum fregit* will be found in the

opinion of the court in the case of Foote *vs.* Merrill, 54 N. H., 490. That was an action of trespass to recover damages for the taking of timber from the plaintiff's land. The court said:

"It may be assumed, although it is not stated in the case, that the court instructed the jury that the plaintiff was entitled (as he manifestly was) to recover for the injury, if any, which was done to his soil, as well as 'the value of the timber after it was cut and made ready to be hauled off the land.' It is to be inferred that the court permitted the plaintiff, although he had elected to bring trespass for breaking and entering his close and cutting down and carrying away his trees, to ignore the allegation and proof of cutting, and recover the damage done by breaking and entering the close and carrying away the trees, as if the cutting had been previously done by the plaintiff himself. The plaintiff has therefore, in this form of action, recovered a verdict, which includes the value of the defendant's labor in cutting and trimming the trees. That this is not a just rule of damages is manifest, although it may be probable that but a small proportion of the amount of the verdict in this case was given for the added labor. Had the defendant set fire to the plaintiff's trees and destroyed them, the measure of damages would have been their value as they stood on the land; and we cannot say that he justly ought to pay any more for cutting and removing them than for destroying them, nor that the plaintiff justly ought to receive any more in one case than in the other. If the plaintiff by pursuing a different remedy might have availed himself of the benefit of the defendant's labor, this may afford no reason for giving it to him in the form of action he has chosen to adopt."

* * * * * *

"If the owner of timber, cut upon his land by a trespasser, gets possession of it increased in value, he has the benefit of the increased value. The law neither divests him of his property, nor requires him to pay for improvements made without his authority. Perhaps in trover, and possibly in trespass *de bonis asportatis*, he may be entitled to the same benefit. But we see no occasion for giving it to him where he brings his suit for the whole trespass of breaking and entering his close and cutting down and carrying away his

trees as a continuous act. The plaintiff is entitled to be compensated according to the magnitude of his loss. The defendant ought only to be liable to compensate him according to the magnitude of his loss. The inquiry should be, how much was the plaintiff injured by the breaking and entering of his close, and the cutting down and carrying away of his trees? *The true measure of damages is the amount of injury which the plaintiff has actually suffered from the whole trespass.* If the trees were worth no more to the plaintiff to stand than to the defendant to be cut into timber at that time, their value as timber, with the reasonable expense of cutting deducted, was the measure of the injury which was done to the plaintiff by cutting them. This is not the rule of damages which was adopted by the court. The instruction to the jury was erroneous, because it allowed the plaintiff to recover a verdict which included the value added to the timber by the defendant's labor."

The several counts of the complaint in the case at bar contain the usual averments in the common-law action of trespass *quare clausum fregit* (2nd Chitty on Pleading, 869).

There are at least two cases in which the supreme court of Minnesota, in actions growing out of facts similar to those in this case and where the complaint set forth the same averments that are to be found in the complaint in this case, has held that the proper measure of damages where the defendant has taken timber from the land of another, under the mistaken belief that he had the right to do so, is the value of the standing timber to the owner as such.

In Whitney *vs.* Huntington, 37 Minn., 197, the title to the land in question was in dispute. One of the parties to the dispute, who believed that his title was good, but who, in fact, had no title at all, cut the timber on the land, removed it, and sold it. In holding that he was liable only for the value of the logs as standing timber, the court said:

"We think no more is necessary than that the trespasser, without culpable negligence or a wilful disregard of the rights of others, shall have acted in the honest and reasonable belief that his conduct was rightful. Notice of an ad-

verse claim would be an important element to be considered; but that alone would not necessarily place the wrongdoer in the position of a culpably wilful trespasser."

The court also refers to the case of Jegon *vs.* Vivian, L. R., 6 Ch. App., 742–760, in which, upon an exactly similar state of facts, precisely the same conclusion was reached.

In King *vs.* Merriman, 38 Minn., 47, the owner of land by a written contract had authorized certain persons to enter upon it and cut and remove timber therefrom during the logging seasons of 1883–'4 and 1884–'5. The action was brought for the taking and removing of timber from the land under this contract later than the logging season of 1884–'5. At the trial the court held that the defendant could not reduce the damages by showing that in cutting the timber he acted in good faith and under the honest belief that he had the right under the contract to cut the timber after the time specified in the contract. A verdict was accordingly rendered against him for the full value of the logs; but the supreme court of Minnesota reversed the judgment entered on this verdict and held that the question whether the defendant had acted in good faith should have been submitted to the jury, and that the jury should have been instructed that if they found that he had acted in good faith he was liable only for the value of the trees as standing timber.

IV.

In any event the contractors should have been allowed credit for the amount paid to the United States for stumpage on account of the 14,850,260 feet of timber included in the verdict (110).

All the contracts bind the contractor to pay "to the United States Indian Department, or its authorized agents" 10 per cent. of the contract price as stumpage (45, 47, 53, 55, 57).

There was paid to the authorized agent of the Indian Department in cash 10 per cent. of the aggregate amount due from the contractors for all the timber that was taken (100, 119, 120, 122). The total amount paid on account of stumpage is shown in the column headed "Stumpage" in the table on page 122 to have been $7,593.44. This sum represents the stumpage on the whole 17,600,260 feet of timber taken. There are included in the verdict only 14,850,260 feet. The stumpage representing this quantity of timber would be $6,400. Adding interest from May 31, 1892, to the date of the verdict—July 3, 1900—we find that the aggregate is about $9,500.

This stumpage money the contractors paid to the United States. No part of it has ever been returned and no tender to return it or any part of it has ever been made. The United States is therefore in the position of one who, having received its own price for its timber, has obtained a judgment requiring that price to be paid to it again, and that upon a ruling which must be held to assume that the contractors who are thus required to make double payment acted in the matter in entire good faith and under the superintendence of Government officers who were also acting in good faith. We cannot think that this court will permit such an unjust result to stand.

In the brief filed in the circuit court of appeals on behalf of the United States in support of this judgment, counsel for the United States dwelt at great length on the question of the good faith of the defendants as bearing upon the measure of damages, but they based their argument on this point almost entirely upon the evidence relating to the quantity of logs that was cut from green timber—that is to say, the Government at the close of the evidence abandoned its claim that it was entitled to damages because some

green timber was cut, and obtained a verdict by the instruction of the court based solely upon the proposition that, as to the quantity of timber cut in excess of the aggregate amount specified in the contracts, the defendants were liable without regard to whether that excess was all green timber, or all dead timber, or partly one and partly the other, and then sought to maintain that verdict and the judgment entered thereon by asking the appellate court to find, what was the province of the jury alone to decide, that a large quantity of green timber was cut, and from the fact so found to infer a want of good faith, not in taking green timber, but in taking an undue quantity of dead timber. We cannot conceive that such a course can affect the judgment of this court on the questions of law which are raised by this record, as it has been made up by the trial court, following the views of the counsel for the United States. They saw no doubt that the controversy which the Government opened when it seized the logs and brought the suit had degenerated into a mere question of expert testimony as to the extent to which a tree must be injured by fire to entitle it to be classified as dead timber. The circuit court of appeals had held, when the case was before it for review after the first trial, that the position of the Government as to what constitutes dead timber was untenable. On that subject the circuit court had said:

"If the phrase 'dead timber' should be held to include only such trees as are utterly destitute of vitality in their trunks and branches, it would probably happen that much valuable timber would be lost, and that one object of the statute which is now under consideration would be frustrated by waiting for such a state of decay to be reached. In the course of a single season a tree might become to a large extent valueless for the purpose of making lumber, although at the commencement thereof it manifested considerable signs of life, and, if it had been then or previously cut, would have yielded a good quantity of lumber. In this respect the law should be given a reasonable interpretation,

having in view the purpose of the law-maker." [See page 56 of Appendix.]

If the Government at this late day wishes to again make the claim which at the close of the trial below it practically abandoned—that a large proportion of these logs was cut from green timber—it will have that opportunity if the judgment which it has obtained on a different ground should be set aside. But the evidence relating to that subject is proper for discussion before a jury and can not be considered here.

V.

As to the exclusion by the trial court of the telegram of March 16 from the acting Commissioner of the General Land Office to the Logging Company, and the letter of March 18, 1893, from Warriner, as special agent of the General Land Office, to the Logging Company (101–123).

This correspondence was material and important for two reasons. In the first place, it showed that it was the understanding of the Government that the bonds were accepted in lieu of the logs, a point which the bonds (21–35) themselves would seem to have left in a state of uncertainty. And, in the second place, the telegram and the letter were important as showing that the acting Commissioner of the General Land Office had approved the bonds before they were accepted by the Government, thereby adding additional weight to the argument hereinbefore made as to the construction of the contracts with the Indians recognized by all parties by their conduct subsequent to the date of the contract. Since, as has been seen, the bonds showed on their face that the only controversy that had arisen between the Government and the contractors was whether a part of the logs had been cut from green timber, it was an important

fact that this admission was made not merely by the local agents in charge of the matter for the Government, but by the General Land Office itself. If that was the only controversy there could have been none as to the quantity of logs cut from dead and down timber.

VI.

As to the exclusion of the evidence of Charles A. Smith in relation to conversations with certain Indians in the fall of 1891.

This ruling forms the subject of the fifth assignment of error. Charles A. Smith in 1891 was a member of the firm of C. A. Smith and Company, which firm is a defendant in this suit, and was also the secretary and treasurer of the Logging Company. The contracts out of which this case grows were all made in the latter part of 1891. Smith testified that in fall of 1891 some of the Indians came to his office in Minneapolis. He names several of them, including some of the Indians with whom the contracts involved in this case were made, and expressly said that the contracts were signed after the conversation that he then had with these Indians; but he was not permitted to testify that the Indians then informed him "that there was a large amount of dead and down timber on the reservation which could be cut" (98, 99).

Since the measure of damages in the case largely depends upon the good faith of the defendants, any evidence which bears upon that question was competent. Of course, statements of the Indians were not admissible to show that in fact there was a large amount of dead and down timber on the reservation, but they would seem to be clearly proper for the purpose of showing that the defendants had information to that effect upon which they would naturally rely.

VII AND VIII.

The evidence which was admitted over the objection of the defendants and which forms the subject of the sixth and seventh assignments of error has no pertinency to the point upon which the court finally decided the case in favor of the United States, but it is submitted that the evidence was plainly irrelevant and should have been excluded. If there should be a new trial it is proper that the opinion of this court on the subject should be made known for the guidance of the circuit court at the next trial.

IX.

The eighth assignment of error relates to the exclusion by the court of testimony offered by the defendants as to the trade meaning of the term "dead timber." This evidence, too, is irrelevant upon the point upon which the case finally went off, but it may become very important if there should be another trial. It is submitted that under the repeated decisions of this court the evidence was admissible. Robertson *vs.* Salomon, 130 U. S., 412, holding oral evidence competent to show that in common parlance beans are vegetables and not seeds; Thornton *vs.* Smith, 8 Wall., 1, and Rives *vs.* Duke, 105 U. S., 132, holding such evidence admissible to prove that "dollars" meant Confederate money; and Robinson *vs.* U. S., 13 Wall., 363, holding such evidence admissible to show that a contract to deliver a quantity of barley meant to deliver it, not in bulk, but in sacks.

X.

AS TO THE JUDGMENT FOR COSTS.

The total costs taxed and allowed against the defendants in this case amounted to $5,320.66 (67–71). On this question we submit the case upon the following extract from the brief filed in the circuit court of appeals on behalf of the plaintiffs in error.

The court erred in taxing any costs against the defendants.

In the courts of the United States costs are governed by the Federal statutes and not by State laws or the practice of State courts.

O'Neil *vs.* R'y Co., 31 Fed., 663.
U. S. *vs.* Treadwell, 15 Fed., 532.
Tesla Electric Co. *vs.* Scott, 101 Fed., 524.

There are various statutes regulating the taxation of costs, when the United States is a party, in particular classes of cases.

U. S. *vs.* Harmon, 147 U. S., 268, 282.
Carlisle *vs.* Cooper, 64 Fed., 472.
U. S. *vs.* Davis, 54 Fed., 147.
Marine *vs.* Lyon, 62 Fed., 153.

But, so far as we are aware, there is not and never has been a statutory provision specifically regulating the taxation of costs between the United States and an adverse litigant in a case similar to that at bar.

It is said that at common law the sovereign shall neither pay nor receive costs.

3 Black Comm., 400.
1 Chitty Cr. Law, 825.

Whatever might be our opinion of the justice of this rule, if we were to discuss the question as *res nova* under modern republican ideas of a sovereign, we must concede that the rule has at least one equitable feature in that if the sovereign does not pay costs when it loses it does not get them when it wins. The same equity has been preserved in rule 31 of the circuit courts of appeals to the effect that "no costs shall be allowed in this court for or against the United States."

A practice, however, seems to have grown up in the United States circuit courts of adopting only one-half of the common-law rule, with the result of taxing costs in favor of the United States in classes of cases where no costs are allowed in favor of the adverse party. We claim that this practice is inequitable and against common-law tradition; that it has never been approved by the United States Supreme Court; and, further, that it has never been sanctioned by any reported Federal or State decision, where the point has been directly raised, argued, and passed upon. The amount of costs claimed by the Government in this case is large—over $5,000—or more than twice the amount in controversy required to give the circuit court original jurisdiction of a lawsuit. Defendant's costs have been nearly as great, and they could not have collected them if it had been finally determined, as it has been once, that the Government had no cause of action. Under these circumstances—however general or uniform may have been the practice of inferior courts in taxing costs in favor of the United States, however much deference a subordinate tribunal might feel obliged to yield to this practice—before this court of appellate jurisdiction we claim the right to raise and discuss the question *de nova* and have a decision based on reason and justice.

As already said, the United States Supreme Court has

gone no farther than to hold that, in the absence of a permissive statute, no costs can be taxed against the sovereign.

U. S. *vs.* La Vengeance, 3 Dall., 301.
U. S. *vs.* Barker, 2 Wheat., 395.
U. S. *vs.* Hove, 3 Cr., 73.
U. S. *vs.* Ringgold, 8 Pet., 150.
U. S. *vs.* McLemore, 4 How., 286.
U. S. *vs.* Boyd, 5 How., 29.
The Antelope, 12 Wheat., 550.

The decisions of the State courts seem to be to the same effect.

People *vs.* Pierce, 6 Ill., 553.
People *vs.* Teazel, 84 Ill., 539.
Metcalf *vs.* Auditor General, 38 Mich., 94.
Aplin *vs.* Baker, 84 Mich., 113.
State *vs.* Harrington, 2 Tyler (Vt.), 44.
Swan *vs.* Colfax, 2 Tyler (Vt.), 258.
State *vs.* Kinne, 41 N. H., 238.
State *vs.* Stearns, 31 N. H., 106.
State *vs.* Webster, 8 Me., 105.
Com. *vs.* Todd, 9 Bush, 708.
Coolier *vs.* Powell, 23 Ala., 579.
Stephens *vs.* State, 47 Ala., 696.
State *vs.* Greenwell, 4 Gill & J., 407.
State *vs.* Taylor, 34 La. Ann., 978.
State *vs.* Waggner, 42 La. Ann., 54.
People *vs.* Cloud, 50 Ill., 439.

In none of these cases will there be found any consideration of the reason or extent of the rule, but simply a bald affirmation that the sovereign does not pay costs. Some of the decisions contain the statement that statutes as to costs do not apply to the State, unless it is expressly named. But

on this statement the query at once arises—if the statutes do not apply to the State paying costs, why do they apply as to its receiving costs? Even-handed justice, plain common sense would seem to say that what is justice in one case ought to be justice in the other; that if the State does not pay costs, it ought not to receive them.

So far as our researches have gone we have found no case in the State or Federal courts, where the question has been raised, which holds that in the absence of an express statute the sovereign, if successful, can recover costs in a case in which, if unsuccessful, it would not pay costs. The nearest to a judicial expression which we have found is the remark in U. S. *vs.* Davis, 54 Fed., 147, 153, that "it will not be questioned that general costs may now be awarded to the United States, when it is the prevailing party." But this remark was purely *obiter* in that case, since the only question was as to the United States paying costs, not as to its receiving them, and the authorities referred to decide only the first half of the question. We see not why the proposition stated by the court should not be questioned, if it is against equity and there be nothing to support it except a more or less general practice, which has apparently never been subjected to the test of judicial examination and approval.

It is a general principle "that when the State goes into a court of justice as a suitor to obtain a judicial remedy it is subject to the same rules and is to the same extent bound to respect the judgment as parties are in the case of litigation between private persons."

Buchanan *vs.* R'y Co., 71 Fed., 324, 331.

"It is true the State cannot be compelled to litigate controversies with individuals; but when it voluntarily comes into court, asking the determination of its rights in a mere business transaction with an individual, it would seem that

it should be judged by the same rules and principles as are applied in controversies between other parties."

State *vs.* Dennis, 39 Kan., 516.

"When it becomes a suitor, it waives for the time its dignity as a sovereign. It lays aside its strong arm, by which it can at once enforce its own claims, and submits itself to the arbitration of the court and its practice and its proceedings."

People *vs.* Brandreth, 36 N. Y., 196.

"When the United States voluntarily appear in a court of justice, they at the same time voluntarily submit to the law, and place themselves on an equality with other litigants."

U. S. *vs.* Ingate, 48 Fed., 251.

See also:

Brent *vs.* Bank, 10 Pet., 615.
U. S. *vs.* Floyd, 8 Wall., 77.
U. S. *vs.* Coal and C. Co., 18 Fed., 278.

If, then, it be true that the sovereign, as a suitor seeking to enforce a private right of property, comes into court on an equality with private individuals and submits itself to the practice and procedure of the tribunal, we fail to see any justification for the position that the sovereign will not pay costs, but can collect them. Where is the equality between the parties if the sovereign, as in the present case, might, when successful, collect over $5,000 in costs and not pay one cent when unsuccessful? If this is not a case of one law for the sovereign and another for the individual it would be difficult to imagine one.

Nor is it any answer to say that statutes as to costs do not apply to the State unless expressly named. We are willing to concede the correctness of the principle; but the principle is violated, not followed, when it is held, as by the court below, that a statute of costs applies in favor of the State, but not against it.

We claim that this court, in the absence of authority to the contrary, with its own rule of practice and the teachings of the common law, establish the reasonable and equitable rule that the State neither pays nor receives costs, unless pursuant to express statutory enactment. It also seems to us a reasonable inference, from the fact that Congress has passed numerous statutes regulating in various ways the payment of costs in different classes of suits to which the United States may be a party (see examples cited in 54 Fed., 147, and 62 Fed., 153), that it was the intention of Congress to leave the common-law rule to apply to the classes of cases for which no specific provision was made. The circuit court of appeals in the fourth circuit has said:

"As costs are not a matter of right and are not recoverable as an incident to the judgment, but depend on statutory provisions, if he (the party adverse to the United States) desires costs in case of success, he must show by the act under which he sues that the United States has consented to pay costs, if defeated."

Marine *vs.* Lyon, 62 Fed., 153.

Why, then, if costs are not an incident to the judgment, but depend on the statute, should not the United States, when seeking to recover costs of an adverse party, be required to show the statutory basis for its claim, especially if it be true, as a general principle, that statutes as to costs do not apply to the sovereign unless expressly named?

The court erred in taxing the item of $356.69 for reporter's fees for record second trial for appeal.

The item of costs here specially objected to was for the stenographer's transcript of evidence furnished to plaintiff below after the conclusion of the second trial and for the purpose of preparing its record for the last appeal to this court [the circuit court of appeals]. The only statute under which this item could be claimed to be taxed is section 983,

United States General Statutes. But this section does not cover the cost of the transcript of evidence which was not obtained for nor used on the trial of the cause in the circuit court, but only for the purpose of an appeal to this court, and, so far as we are aware, all the Federal authorities are against the allowance of this item.

Monahan *vs.* Godkin, 100 Fed., 196, and authorities cited.

It is respectfully submitted that for all the foregoing reasons the judgment of the circuit court of appeals should be reversed, and that court directed to reverse the judgment of the circuit court and remand the case to the circuit court for a new trial.

A. S. WORTHINGTON,
Attorney for Plaintiffs in Error.

APPENDIX.

APPENDIX A.

THAYER, *Circuit Judge:*

This suit was brought by the United States against the Pine River Logging & Improvement Company, a corporation, and Joel B. Bassett and William L. Bassett, copartners as J. B. Bassett & Co., who are the defendants in error, and against John S. Pillsbury and Charles A. Smith, copartners as C. A. Smith & Co., for the wrongful conversion of 22,005,921 feet of pine lumber, which was alleged in the complaint to have been taken from the Mississippi Indian reservation in the State of Minnesota. The complaint, which contained nine counts, charged, in substance, that nine different parties had wrongfully felled certain pine trees standing on said Indian reservation, and had cut the same into logs, and had removed the logs from the reservation; that the trespass in question was committed at the special instance and request of the defendants; that the logs, when thus cut, had been delivered to the defendants; that the defendants had thereupon caused the logs to be floated down the Mississippi river to the city of Minneapolis, and to be there manufactured into lumber; and that they had sold the lumber, and had appropriated the proceeds thereof to their own use.

The answers which were filed by the defendants to the aforesaid complaint alleged, in substance, the following facts: That the logs referred to were cut under and by virtue of contracts which had been entered into with certain Chippewa Indians for the cutting of dead and down timber found on said reservation; that said contracts had been executed in pursuance of the provisions of an act of Congress approved February 16, 1889, in relation to the cutting of dead and fallen timber on Indian lands (25 Stat., 673, c. 172); that payment for the logs so cut and removed had been made in full to the United States and to the proper Indian agent in accordance with the provisions of said contracts; that said

logs were so cut by said Indians, and delivered to and accepted by the defendants in good faith, in the honest belief that said logs had been lawfully cut under said contracts, from dead and down timber, and that the defendants were entitled to the same, and became the owners thereof upon delivery of the logs, and upon the making of the aforesaid payments; that after the said logs had been delivered to the defendants, and before they were floated down the river to Minneapolis, the United States, through its proper officer, had seized and taken possession of the logs, claiming that they were cut from green and growing timber, and not from dead or down timber; that thereafter, for the purpose of preserving said logs, and realizing the full value of the same for the party who should ultimately be determined to be owner thereof, a contract was entered into between the United States and the defendants, which was as follows:

* * * * * * *

The answers further showed that thereafter, on March 10, 1893, after the logs had been driven to the city of Minneapolis in compliance with the provisions of the aforesaid contract, two bonds were accepted by the United States, one of them being executed by the Pine River Logging & Improvement Company as principal, and the other by the members of the firm of J. B. Bassett & Co. as principals. The bond executed by the Pine River Logging & Improvement Company contained the following recitals and condition, and the bond executed by the firm of J. B. Bassett & Co. was of like tenor and effect.

* * * * * * *

Replying to the aforesaid answers, the United States admitted, in substance, that the defendants, The Pine River Logging & Improvement Company and J. B. Bassett & Co., had entered into contract with the various persons named in the answers for the cutting of logs from dead and down timber on said Mississippi Indian reservation, but it denied that the logs in controversy had been cut pursuant to said contracts or in accordance with the act of Congress of February 16, 1889, authorizing the cutting of dead and down timber on Indian reservations. It averred, on the contrary, that the logs on account of which it sued were cut from pine trees on said reservation which were alive and standing. The United States admitted that it had seized and taken possession of

the logs in controversy, subsequent to the delivery thereof to the defendants; that it had thereafter entered into a contract with the defendants, such as was described in the answer, for the driving of the logs down the river to the city of Minneapolis, and that it had thereafter, on March 10, 1893, accepted from the defendants the bonds which were set forth in full in the answers. After the case was at issue on the aforesaid pleadings, the defendants, The Pine River Logging & Improvement Company, and Joel B. Bassett and William L. Bassett, composing the firm of J. B. Bassett & Co., filed a motion for judgment against the Government on the pleadings, for the sole reason, as stated in the motion, that on the facts admitted by the pleadings "the plaintiff above named (the United States) is not entitled to maintain an action of trover or conversion against said two defendants, or either of them, for the matters and things set out in said cause of action." This motion was sustained by the circuit court, and a judgment was entered against the United States. To reverse said judgment the case was removed to this court by a writ of error.

The grounds upon which the defendants in error seek to sustain the summary judgment which was entered in their favor by the circuit court is that by accepting the two bonds of date of March 10, 1893, the United States, in effect, agreed to relinquish all of its right, title, and interest in the logs which had been cut on the Indian reservation and to look to the bonds for whatever indemnity it might be able to obtain for the wrong and injury complained of. It is urged, in substance, that by accepting the bonds the Government not only agreed that the logs might be sawed into lumber, but that it also impliedly agreed that the lumber might be sold by the defendants for their own benefit; that the Government cannot count on the sale of the lumber by the defendants after it was sawed as a wrongful act, nor maintain an action against the defendants, except for a trespass on lands belonging to the United States, and that in such action the damage recoverable is merely compensation for the injury done to the land, over and above the value of the timber which was cut and removed. We are not able to assent to that view of the case. By the terms of the bonds it is obvious that the Government cannot maintain a suit thereon against the defendants until it has first recovered a judgment against them in some other form of action. Therefore

the view contended for denies the right of the Government to recover any compensation for the large amount of standing timber alleged to have been cut on the reservation, and limits its recovery to compensation for such injury as may have been done to the land, over and above the value of the severed trees, while the defendants were engaged in removing the timber. The bonds contained no provision authorizing the defendants to sell the timber in controversy after it should be manufactured into lumber at Minneapolis, and in view of the recitals found therein, and the circumstances under which they were executed and accepted, it is clear, we think, that the Government neither intended to authorize a sale of the lumber nor to part with its title thereto, nor to relinquish any of its rights growing out of the original wrongful acts described in the complaint. After the logs were seized, the Government, by the agreement of May 27, 1892, consented that the logs might be driven "without charge or cost to the United States, and under the supervision of a special agent of the General Land Office, * * * to such boom in the Mississippi river, at or near the city of Minneapolis, as the Mississippi & Rum River Boom Company may designate," for the purpose of preserving the property for the benefit of the party who should be adjudged to be the rightful owner, provided, however, that nothing done in that behalf "should be held in any proceeding, legal or otherwise, * * * to impair any right, title, property, or interest that the said parties of the second part, or either of them, or the United States, may have in or to the said logs, or any of them." The object of the contract was declared to be "to recognize and continue possession in the United States, and to allow said logs to be driven without in any way affecting the question of right, title, property, or interest in the logs, and to leave such questions for future determination."

When the logs had reached Minneapolis, it was found necessary to manufacture the same into lumber, as the bond recites, "for the preservation of the property for the interest of all concerned, pending said investigation, and a suit to be instituted by the United States, if it shall elect to do so, to determine the questions at issue between the parties." We fail to discover in the provisions of these bonds anything tantamount to a consent on the part of the United States that the defendants might market the lumber, when

the logs should have been sawed, for their own account, or any implied agreement by the United States that it would relinquish its title thereto. By the acceptance of the bonds the Government contemplated no relinquishment of its property rights, and no alteration in the legal status of the parties. It did consent that the form of the property might be changed from logs to lumber for the purpose of preserving its value, but beyond this its consent did not extend. The manifest purpose of the parties in entering into the agreement of May 27, 1892, and in executing the bonds of May 10, 1893, was to put the property in such form and shape that its value might be preserved, pending the litigation which was in contemplation, without altering the legal rights of either party. After the logs were manufactured into lumber, the defendants held the lumber as agents or bailees of the United States, precisely as they had previously held the logs under the agreement of May 27, 1892, while they were being driven down the river to Minneapolis.

It results from these views that the sale of the lumber by the defendants and the appropriation of the proceeds to their own use was a wrongful act, on account of which the United States may maintain an action for conversion, provided it appears on the trial, as is alleged in the petition and in the reply, that the lumber was in fact made from growing trees which were felled on the Indian reservation in question, and were cut into logs and removed therefrom in violation of law. Moreover, the Government did not lose its right to maintain an action for conversion on account of the wrongful removal of the logs from the reservation, the same having been cut from growing trees, by reason of the fact that it subsequently seized the logs, assumed the possession thereof, and entered into the contract aforesaid for driving them down the river to the city of Minneapolis. The doctrine is well settled that the recovery of the possession of property, otherwise than by judicial process, which has been wrongfully converted, does not deprive the true owner of his right to maintain an action of trover. In such a case the recovery of the property from the wrong-doer cannot be pleaded in bar to the action, but merely in mitigation of damages. Cattle Co. *vs.* Hall, 33 Fed., 236; Bank *vs.* Leavitt, 17 Pick., 1; Curtis *vs.* Ward, 20 Conn., 204;

Ewing *vs.* Blount, 20 Ala., 694; Pierce *vs.* Benjamin, 14 Pick., 356, 361; Sparks *vs.* Purdy, 11 Mo., 219, 223.

The question does not arise upon the record whether, in the event of a recovery by the United States, the defendants will be entitled, by way of mitigation of damages, to an allowance for the services rendered by the defendants in driving the logs from the place of seizure to Minneapolis and sawing them into lumber, whereby the value of the property was enhanced. No such question was considered by the circuit court, and no opinion on that point will be expressed by this court on the present occasion. The trial court decided the case upon the theory that the facts admitted by the pleadings disabled the United States from maintaining the present action, and in so ruling we think that the trial court erred.

It is further contended in behalf of the defendants in error that, although the ground upon which the trial court based its judgment was erroneous, yet that the judgment in their favor ought not to be disturbed, because the record discloses a misjoinder of causes of action, in that the Pine River Logging & Improvement Company and J. B. Bassett & Co. should have been sued separately for acts of conversion by them separately committed. There are two answers to this contention. The complaint which was filed by the United States does not disclose a misjoinder of causes of action. The allegations of the complaint are sufficient to show that all of the defend ants were jointly concerned in the cutting and removaof the logs from the reservation, and the plaintiff may elect to rely for a recovery on the original act of conversion rather than upon a sale of the lumber after the logs were sawed, with the consent of the United States. A second reason why the judgment cannot be upheld on account of the alleged misjoinder of causes of action, even if that point was well taken, is that the judgment rendered by the circuit court is in such form that if sustained it would bar a subsequent suit against either of the defendants for the wrongful conversion of the property. The circuit court "ordered and adjudged * * * that the plaintiff * * * take nothing of the said defendants, The Pine River Logging & Improvement Company and Joel B. Bassett and William L. Bassett, * * * and that they, and each of them, do go hence without day." This is, without doubt, a final judgment on

the merits, whereas, if the defendants were entitled to no greater relief than an order quashing the summons or dismissing the complaint because separate causes of action against different defendants had been erroneously united in the same complaint, the judgment should have been so expressed. The trial court evidently intended to dispose of the case on its merits, and entered a judgment accordingly. No attention was paid to the plea in abatement, and no action by the trial court was predicated upon that plea. We think, therefore, that the judgment cannot be upheld on the ground last suggested. The judgment of the circuit court is accordingly reversed, and the case is remanded for a new trial.

U. S. *vs.* Pine River Logging & Improvement Co., 78 Fed. Rep., 320, 325.

APPENDIX B.

THAYER, Circuit Judge, after stating the case, as above, delivered the opinion of the court.

The answer which was filed by the Pine River Logging & Improvement Company (hereinafter termed "Logging Company") admitted, in substance, that under and by virtue of the three contracts between itself and Indians, which are referred to in the foregoing statement, it had received into its possession, and had converted into lumber, and ultimately sold, an amount of pine saw-logs cut upon Indian reservation, which had yielded in the aggregate 13,463,400 feet of lumber, board measure. The defendants, Joel B. Bassett and William L. Bassett, likewise admitted, in substance, that under the two contracts with Indians above referred to, which they had succeeded in obtaining, they had received and converted into lumber, and sold, an amount of pine saw-logs, cut upon Indian reservations, which had yielded in the aggregate 4,136,860 feet of lumber, board measure. In other words, it was disclosed by the pleadings that under the five contracts with Indians above described, which together authorized the cutting and removal of dead and down timber to the amount of 2,750,000 feet, "more or less," or "about," the defendants had actually received from Indians, with

whom they had severally entered into the contracts aforesaid, no less than 17,600,260 feet of lumber in the shape of pine saw-logs, the same being logs that had been cut on Indian reservations and removed therefrom. The evidence in behalf of the Government tended to show that a much greater amount of lumber, to wit, 22,000,000 feet, had been cut and removed under an authority claimed to have been conferred by the aforesaid contracts. In view of these facts, the Government, by its counsel, asked the following instruction, which was refused:

"The contracts under which it is claimed these logs were cut provided for the cutting of a total of 2,750,000 feet of logs from dead and fallen trees. The amounts named in the five contracts are qualified by the words 'about' and 'more or less.' I charge you that the amounts named in the contracts are a material part thereof, and the addition of the qualifying words 'about' and 'more or less' is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies. The timber cut in excess of the amount stipulated beyond such accidental variations was illegally cut and removed, whether cut from dead or living trees."

The first question, therefore, which deserves consideration is whether an error was committed in refusing the foregoing instruction.

When an agreement is entered into to sell and deliver a certain quantity of an article the amount specified is often regarded as material and determinative of the amount sold, notwithstanding the use of the qualifying words "about" or "more or less" in connection with the amount specified. In many cases the use of such qualifying words in connection with some specified quantity is merely intended to cover the case of a slight variation in quantity, which may be due either to accident or to an inherent difficulty in making a delivery of the precise quantity sold. Indeed, it seems to be well settled that when a specified quantity of an article or thing bought or sold is mentioned in a contract the amount named will always be regarded as material and determinative, notwithstanding the use of the qualifying phrase "more or less," except in those cases where it is apparent or fairly inferable from other parts of the agreement that a particular lot of goods was intended to be sold without reference to the precise quantity, or enough thereof to

satisfy a particular need or to answer a given purpose. In the latter class of cases the specification of a particular quantity with the qualifying phrase "more or less" amounts to no more than a rough estimate of the probable quantity, which, in the absence of fraud, is not regarded as binding on either party. Brawley *vs.* U. S., 96 U. S., 168; Norrington *vs.* Wright, 115 U. S., 188, 204; 6 Sup. Ct., 12.

The five contracts that are involved in the case at bar contain no provisions from which it can be reasonably inferred that the several quantities of lumber therein specified were not intended to be determinative of the amount to be cut and delivered, or which would justify the conclusion that the amount to be delivered was to be determined by other circumstances. Tested by the contracts themselves, the inference is plain that the stipulation as to quantity is as material and obligatory upon the parties as any other stipulations which the contracts contain, and that the qualifying words "about" and "more or less" were inserted to cover slight variations from the amounts specified in the several contracts, which could not well be avoided in making the deliveries. This conclusion is supported by other considerations. Until the passage of the act of February 16, 1889, quoted above, in relation to dead and down timber, no right had ever been conferred upon Indians residing on Indian reservations to cut and dispose of the timber standing or growing thereon. It was a well-established doctrine then, as it is now, that the fee to all lands embraced in Indian reservations is vested in the United States; that the Indians residing thereon have merely a right of occupancy; and that they are not entitled to cut and sell timber without express legislative sanction. U. S. *vs.* Cook, 19 Wall., 591; Beecher *vs.* Wetherby, 95 U. S., 517. The act in question, which authorized the cutting and removal of dead and down timber, under such regulations as might be prescribed by the President, was passed for the double purpose of preventing such timber from going to waste, and at the same time providing lucrative employment for such Indians residing on reservations as might desire to take advantage of its provisions. It must be presumed from the nature of the law, and the class of persons to whom it relates, and whom it was intended to benefit, that it was the intention of Congress that such profit as might be realized from the sale of dead and down timber should, as far as possible, be shared alike

by all reputable Indians residing on a reservation; that equal opportunities to cut and remove the dead and down timber found thereon should, at least, be afforded to all; and that, in administering the act, care should be taken by the executive department of the Government in granting licenses for the removal of timber, so that few favored individuals, backed by large means, might not be able to appropriate all the benefits of the act, to the exclusion of the many. It must also be presumed that the law has heretofore been administered by the executive department of the Government, or, at least, that the intention has been to administer it, in accordance with the legislative purpose last expressed. Inasmuch, then, as the approval by the President of the five contracts now in question in effect conferred on a few persons the right to appropriate all the dead and down timber that might be found on certain Indian reservations; if it be true, as is contended, that the stipulations as to quantity therein contained are immaterial and meaningless, and inasmuch as one of the main objects of the law would be defeated by granting to a few favored individuals a roving commission of that character, it is not reasonable to suppose that any such authority was intended to be conferred when such contracts were approved by the President. It is altogether probable that the provisions found in the several contracts, limiting the total quantity of timber to be cut to 2,750,000 feet, were regarded by the executive department of the Government as material and obligatory, and that the agreements were approved by the President upon that theory. Viewing the contracts, then, in the light of well-established rules applicable to their interpretation, and also in the light of the statute under which they were executed, it is clear, we think, that the quantity which could be lawfully cut and removed was definitely fixed by the contracts, and that there was no warrant in law for cutting an amount of timber which was to any considerable extent in excess of the prescribed quantity.

In opposition to the foregoing views, and as a reason why the defendants should not be held accountable for their logical consequences, it is urged, in substance, that the defendants have already paid the contract price for such timber as was taken in excess of the prescribed quantity; that the timber was also delivered to them by the agents of the United States, and that the position now assumed by the Govern-

ment is "one of rank injustice" to its citizens. Concerning these several statements, it is sufficient to observe that the timber which was cut and removed from the reservation in excess of the prescribed quantity belonged to the United States, and that it has never as yet been paid for the same. The contracts which were approved by the President amounted to no more than a license to receive and appropriate a certain quantity of timber, and to pay the agreed price for the cutting and removal thereof to certain Indians. The transaction on the part of the Government was, in substance, a gift of a certain amount of timber to certain Indians. All the timber which was appropriated in excess of the stipulated amount was wrongfully taken, and such payments therefor as may have been made by the defendants to third parties by whom the timber was wrongfully cut and removed cannot be permitted to prejudice the right of the United States to recover its value. Moreover, no agent or officer of the United States who was on the ground when the deliveries took place had a shadow of authority to sanction a delivery of timber to any considerable amount, in excess of the quantity specified in the several agreements, under color of which the timber had been cut and removed. These agreements were as obligatory upon all agents and officers of the Government who were concerned in the deliveries as they were upon the parties to the several agreements, and none of the agents or officers there present were vested with the power either to alter or modify their provisions with respect to the quantity of timber that might be delivered, or to estop the United States from asserting its rights by any act of omission or commission. Whiteside *vs.* U. S., 93 U. S., 247, 257; *In re* Floyd Acceptances, 7 Wall., 666; Bowe *vs.* U. S., 42 Fed., 761, 778.

Neither do we perceive that the plea of good faith, which is so earnestly urged in behalf of the defendants, can be of any avail, or is entitled to serious consideration. All of the defendants except John S. Pillsbury and C. A. Smith were parties to one or more contracts, under color of which the timber was received and appropriated. They do not occupy the position of innocent third parties who bought and paid for the logs after they had been removed from the reservation and had entered the market, but they received and paid for the same with full knowledge of every provision which

the contracts contained and with full knowledge that, under license permitting the removal of dead and down timber to the amount of 2,750,000 feet, they were certainly receiving more than six, and possibly as much as eight, times that amount. As they cannot be heard to plead ignorance of the law as excuse for their misconduct, the pretense that the action of the Government savors of injustice when it seeks to compel them to pay for property which they have wrongfully taken and appropriated is entitled to little weight. On this branch of the case, therefore, we are constrained to hold that the instruction heretofore quoted contained a correct declaration of the law applicable to the case, and that it should have been given.

Another controversy of much importance arose on the trial below and has been renewed here concerning the meaning of the phrase "dead timber." Counsel for the Government appears to have taken the extreme view that a dead tree, within the meaning of the statute, was one which was utterly destitute of vitality, at least in its trunk and branches. On the other hand, the defendants contended, and their view was substantially adopted by the learned judge of the trial court, that trees should be esteemed dead if they were injured by fire or other cause so "that they will die within a reasonable period, although at the time they are living and have green tops and other signs of life." A further contention of the defendants, which was also sustained by the trial judge, was to the effect that even living trees which were unaffected by fire or other casualty might be properly classed as dead trees provided they were found standing in a clump of trees a large number of which were so badly injured by fire that they would die within a short time. This latter contention of the defendants was based upon testimony, which was offered by the defendants and objected to by the Government, to the effect that lumbermen generally regarded and classified uninjured living trees thus situated and in the midst of dead trees as themselves dead, or as included by the phrase "dead timber."

We are of opinion that the position assumed by the Government was not tenable. If the phrase "dead timber" should be held to include only such trees as are utterly destitute of vitality in their trunks and branches, it would probably happen that much valuable timber would be lost, and that one object of the statute which is now under con-

sideration would be frustrated by waiting for such a state of decay to be reached. In the course of a single season a tree might become to a large extent valueless for the purpose of making lumber, although at the commencement thereof it manifested considerable signs of life, and, if it had been then or previously cut, would have yielded a good quantity of lumber. In this respect the law should be given a reasonable interpretation, having in view the purpose of the lawmaker.

While, for the reasons last indicated, we are not able to adopt the extreme view advocated in behalf of the Government, we are equally unable to assent to the proposition that, under the provisions of the act here in question, living and uninjured forest trees may be classed as "dead timber," provided they stand among other trees, many of which are so badly hurt that they will die in a short time. It is hardly necessary to observe that, if the phrase "dead timber" was thus interpreted, it would afford a convenient excuse for stripping Indian reservations of a large amount of the living timber at present standing or growing thereon, since, in view of the frequency of forest fires at certain seasons of the year, it is probably true that many of the large bodies of timber found on Indian reservations are interspersed more or less thickly with trees which have been injured so badly by fire that they will shortly die. Under the instructions which were given by the trial court such bodies of timber could be entirely removed under licenses granted to cut "dead and down timber" on a simple showing of the licensees that a large number of the trees found on such tracts had been so badly injured by fire that they would most likely die. It is hardly probable, we think, that Congress foresaw and intended an interpretation of the phrase "dead timber" which would lead to such a result. The phrase was doubtless used by the law-maker in its ordinary sense to describe timber which was practically lifeless or mortally hurt and in such a state of decay that a prudent land-owner would ordinarily direct it to be forthwith cut to prevent a further deterioration in value.

The testimony on which the defendants found their claim that the phrase "dead timber," as used in the statute, comprehends living and uninjured trees in a certain situation is clearly inadequate, we think, to support a finding by the jury that the phrase "dead timber" had acquired the

meaning imputed to it by the defendants, and that it was used in that sense by Congress by reason of a well-known custom or usage prevalent throughout the United States or prevalent throughout a large portion of the United States. No attempt was made at the trial to show the territorial extent of the alleged practice of classifying living trees as dead trees, nor to prove that such practice was uniform among all classes of people, even in the locality where the practice was said to prevail. The testimony on this head was, in substance, that lumbermen in a given locality were in the habit of speaking of a clump of trees the greater portion of which had been killed or badly injured by fire as "dead timber." One witness testified in substance—and his testimony may be taken as a fair example of the residue of the evidence on this point—that if called upon to examine a 40-acre tract of timber he would report the tract as dead timber, although he would by no means term the living trees dead trees if he found that the greater portion of the trees had been destroyed by fire. Assuming the several statements of the witnesses to be true, they were not sufficient, in our judgment, to control the interpretation of a public statute to the extent of giving to certain words therein found a meaning which was clearly opposed to their ordinary signification. The proper office of a custom or usage is to explain the meaning of a private contract which is so vague or uncertain that the intent of the parties thereto cannot be determined without the aid of such extrinsic evidence. Barnard *vs.* Kellogg, 10 Wall., 383; Robinson *vs.* U. S., 13 Wall., 363. And while it may be that proof of a custom or usage is sometimes admissible to aid in the construction of a statute as well as a private contract, yet when it is offered for that purpose, and with a view of altering the ordinary meaning of ordinary words or phrases, the evidence concerning the usage ought to show that it was prevalent in all sections where the law was to become operative, and was so far universal in the sections where it prevailed as to leave no room for doubt that the usage was known to the law-maker, and that the statute which it serves to modify was enacted with reference thereto. Giving to the evidence which was adduced in the case at bar its full weight, it was insufficient to establish a usage of that character. We are of opinion, therefore, that the trial

court erred in permitting the jury to find that a custom or usage existed which would serve to change the ordinary meaning of the phrase "dead timber" so as to make it include living and uninjured trees. These latter words, as heretofore intimated, when used with reference to standing timber, should be held to include only such trees as are in fact lifeless, and those which are in such a state of decay in consequence of fire or other casualty that a prudent landowner would cause them to be cut forthwith, to prevent a further deterioration in value.

A question also arose in the trial court concerning the extent to which the Government would be bound by the acts of its logging superintendent, one T. W. Tidd, who had been designated by the Department of the Interior to supervise the cutting and removal of timber under the five contracts now in question. Certain exceptions were taken to the charge of the trial judge on this point which bring the question before this court for consideration. The duties devolved upon the aforesaid officer by departmental rules and regulations were "to go into the woods with the loggers and superintend and direct their labors, to the end that no green or growing timber may be cut and that no live trees are damaged in any manner so as to cause them to die, that they may be marketed under the provisions of the act in question, and to inspect the scaling of the logs."

The instructions which were given on this head were to the following effect: First, that if, without conspiracy or procurement on the part of the defendants, certain timber was wrongfully cut by loggers with the approval and under the oversight of the logging superintendent, by reason of his mistaken view of the terms of the contracts or the character of the timber, such action on the part of the Government's representative would bar a recovery against the defendants for the timber so unlawfully cut; second, that if living timber was wrongfully cut by Indians under color of the contracts without the knowledge or approval of said superintendent, then the Government could recover the stumpage value of the living or green timber so cut, less 10 per cent., although such timber was not cut by reason of a conspiracy among the defendants to obtain the same or by their procurement.

After declaring the law in the manner last indicated, the

court made the following statement, hereafter referred to as the third instruction:

"The Government appointed its own agent for the purpose of supervising and overseeing the cutting of this timber, so that *if timber was cut by the loggers of the character which the Government agent directed the loggers to cut, or assented to their cutting under the contract, the Government would be foreclosed with respect to all such timber. The Government is bound by the action of its representatives just the same as any other person would be who appointed an agent to look after his own interests and matters.* But the loggers would not have the right to cut green timber of the character not described, and if they did that without the knowledge or consent of the Government representatives—did it wrongfully and without his knowledge or assent—they would get no title to the logs, and they could not deliver any title to the defendants, even though the defendants might be innocent of any participation in it."

The exceptions which were taken by the Government were addressed to the first of the foregoing instructions and to that portion of the third instruction which has been placed in italics. The first of these instructions might be upheld if the court intended to say and was understood as saying that the Government was not entitled to recover for timber cut and removed from the reservation in those instances where, as the result of honest mistakes of judgment on the part of the logging superintendent which were committed while he was giving due attention to the performance of his official duties, certain injured trees were classified as dead timber and removed which, in fact, ought not to have been so classified. If thus understood, the instruction was substantially correct. The determination of what timber was "dead timber," in the eye of the statute, as that phrase has heretofore been defined, involved the exercise of judgment and discretion on the part of the logging superintendent; and, as he had been appointed to decide such questions, his decisions thereon, if made in good faith, after the exercise of due diligence to advise himself concerning the character of the timber which was being cut and delivered, ought to be regarded as binding upon the Government. Elliott *vs.* Railway Co., 40 U. S. App., 61; 21 C. C. A., 3, and 74 Fed., 707; Lewis *vs.* Railway Co., 49 Fed.,

708; Wood *vs.* Railroad Co., 39 Fed., 52, and cases there cited.

The third instruction shows, however, that the learned trial judge intended to concede, and was doubtless understood as conceding, to the logging superintendent a greater authority to bind the Government than is last indicated. The instruction contained a statement, in substance, that the Government was bound by the actions of its logging superintendent to the same extent that a private individual would be bound by the actions of his agent, and that if timber was cut by direction of the logging superintendent, and with his assent, the Government was foreclosed as to such timber, provided the defendants had done nothing to influence his conduct. This left the jury at liberty to infer that the Government could not recover the value of any living or green timber that had been cut with the knowledge and without objection on the part of the logging superintendent, although it was manifest that he had been guilty of a gross and willful neglect of his official duties, and had no pretense of discharging them in accordance with law. In other words, it left the defendants at full liberty to profit by derelictions of duty on the part of a public officer, provided they had not caused or inspired such conduct on his part.

For the reasons already indicated, the exceptions to the instructions now under consideration were well taken. It is well-established law that the United States is not liable to individuals for, and is not affected by, the unauthorized acts of its officers, nor for their misfeasances or laches. Gibbons *vs.* U. S., 8 Wall., 269, 274; Minturn *vs.* U. S., 106 U. S., 437, 444; 1 Sup. Ct., 402; Hart *vs.* U. S., 95 U. S., 316; U. S. *vs.* Kirkpatrick, 9 Wheat., 720; Stansbury *vs.* U. S., 8 Wall., 33; Moffat *vs.* U. S., 112 U. S., 24; 5 Sup. Ct., 10. The defendants well knew that no executive officer of the United States, not even the President himself, could authorize the cutting and removal of living and uninjured timber standing on public lands, including Indian reservations, the fee to which is in the United States, because such acts had been prohibited by the public statute (Rev. St. U. S., § 5388) and were not authorized by the act of February 16, 1889 (25 Stat., c. 172) in relation to dead and down timber. They were also well aware that one of the duties imposed on the logging superintendent was to see that no green or growing timber was cut or injured, and that they could only seek shelter

behind the decisions of the superintendent in those cases where it was properly within his province to determine whether injured trees were so badly hurt and liable to deterioration in value that they ought to be classified as dead and immediately cut. The defendants, therefore, should have been held liable for the value of all living and uninjured trees which were cut and removed and ultimately came into their possession, irrespective of the action of the logging superintendent, for the reason that he had no power to vest them with a title to such timber.

In line with the view which appears to have been entertained by the trial court concerning the authority of the logging superintendent to bind the United States, the jury were further instructed, in substance, that where green trees had been cut by loggers without the knowledge of the superintendent, he could, after discovering that they had been wrongfully cut, bind the Government by consenting that such timber might go in under the contract, because when living trees were once cut they were then "dead and down timber." We think that this instruction was erroneous, for the reason that the superintendent had no power to legalize a trespass, and estop the Government from recovering the value of such timber.

The remaining questions which the record presents are of less moment, and will be noticed on this occasion simply for the reason that they may arise on a second trial. It seems that some evidence was offered during the progress of the trial which tended to show that three Indians had cut a certain amount of timber on the reservation without having any contracts of their own which permitted them to do so; that such cutting had been done, however, under color of authority conferred by two of the contracts heretofore mentioned; that, with the assent of the owners of those contracts, the logs had been delivered to the defendants as if cut by the contractors themselves, to discharge their own obligations under said contracts; and that the owners of the contracts had received payment for the logs, as if cut by themselves, with the knowledge and implied assent of the logging superintendent. With reference to this subject, the court charged the jury, in substance, that, while the contracts in suit were not assignable, yet that the owners of the contracts would have the right to employ other persons to cut for them under the contracts,

and that whatever agreement they might make between themselves and their employés to that end would be a matter of no concern to any one except themselves. We perceive no error in giving this instruction. The owners of the several contracts did have the right to employ other persons to cut for them the amount and kind of timber specified therein. The employment of persons for that purpose was not tantamount to an assignment of the contracts, and was not unlawful.

On the trial below the Government asserted a right to recover as damages for the wrongful cutting of its timber not only the value of the timber, but the expenses which it had incurred in identifying and recovering the same. This contention was overruled, and an exception was saved. The proof shows that the logs in controversy were first seized by the United States on the bank of a stream in northern Minnesota, where they were deliverable, and that under certain agreements between the United States and the defendants, which were fully explained in U. S. *vs.* Pine River Logging and Improvement Co., 49 U. S. App., 24, 24 C. C. A., 101, and 78 Fed., 319, when the case was formerly before this court, the United States, without waiving any of its rights, released the logs that had been seized and permitted the defendants to raft them to the city of Minneapolis, where they were sawed into lumber. The lumber was eventually sold by the defendants, as the Government claimed, without its consent and wrongfully. The expenses which the Government sought to prove on the trial were such as it had incurred, after the wrongful seizure and release of the logs, in hunting up evidence to establish its case.

The rule permitting a plaintiff in an action of trover to have an allowance for expenses by him incurred in recovering property that has been wrongfully taken seems to have been applied heretofore only in those cases where the property is actually recovered by the plaintiff, and such recovery is pleaded by way of mitigation of damages. When the damages are thus mitigated the plaintiff is permitted to recoup his necessary expenses in recovering the property; but where there has been no eventual recovery of the property by the plaintiff, and he is compelled to take its value, as in the case at bar, the better view seems to be that the recovery is limited to the market value

of the property at the time and place of conversion and interest. Ewing *vs.* Blount, 20 Ala., 694; Collins *vs.* Lowry, 78 Wis., 329; 47 N. W., 612; Cattle Co. *vs.* Hall, 33 Fed., 236, and cases there cited; 3 Suth. Dam. (2d ed.), § 1141. No error was committed, therefore, by the trial court in excluding the evidence as to expenses that had been incurred by the United States which it sought to introduce.

Under regulations which have been established by the President of the United States for cutting dead and down timber on Indian reservations, pursuant to the act of February 16, 1889, Indians who obtain licenses to cut such timber are required to pay 10 per cent. of the gross proceeds of all dead and down timber cut and sold, to the poor fund of the tribe, to aid in the support of old, sick, and helpless members of the tribe. The contracts involved in the case in hand recognized the existence of this regulation, and in accordance therewith provided for the payment of 10 per cent. of the purchase price of all timber cut and removed to the United States Indian department. Ten per cent. of the purchase price for all timber received under color of the contracts was accordingly paid by the defendants to the proper Indian agent, and the trial court charged that the defendants were entitled to a credit therefor in assessing the damages for green and living timber which was found to have been wrongfully cut and moved. We feel constrained to hold that this instruction was erroneous. If the defendants received and disposed of living and uninjured timber which was wrongfully cut they are liable to the Government for its full value. We are unable to perceive any legal ground upon which payments that they may have made into the Indian poor fund for the support of indigent Indians can be accepted or regarded as payments made to the United States for its benefit. Such payments stand on the same footing as a payment made to a third party, inasmuch as the Government received the money simply as a trustee for the benefit of poor Indians and has doubtless expended it for their benefit.

Another question was raised at the trial, and an exception was duly saved, which will be noticed briefly, because it has been discussed in the briefs, although it is not distinctly raised by the assignment of errors. The question is whether the trial court, at the conclusion of the Government's testimony, properly required it to elect whether it would

take the value of the logs in controversy at the place where they were originally seized—that is, in northern Minnesota—or, in lieu thereof, would take the value of the lumber which was made therefrom at the city of Minneapolis, at which place, as it was claimed, the lumber was wrongfully sold. The trial court ruled, in substance, that after the Government had closed its case, it was no more than reasonable to require it to state at what place and time it would elect to have its damages assessed, because it could not recover the value of the logs and also the value of the lumber made therefrom, and because it would be unnecessary to enter upon a long inquiry as to the cost of rafting the logs to Minneapolis and sawing them, provided it determined to take the value of the logs in northern Minnesota and to have its damages assessed at that time and place. We fully concur in the views of the trial judge on this point, and are unable to see that the ruling in question placed the Government at any disadvantage or prejudiced its rights to any material extent.

The Government further insists that the trial court erroneously refused to permit one of its witnesses to detail a conversation which he had with a person by the name of Galbreath, who was a foreman of one of the logging camps where a portion of the logs in controversy were cut, which conversation occurred at the camp during the winter of 1891 and 1892, and related to the character of the timber, whether living or dead, which was being cut. It also complains because one of its witnesses was not allowed to answer the question whether he regarded the trees which had been burned from six inches to six feet from the butt upwards as dead timber; also because another witness was not allowed to describe the effect which a fire running through his land had had upon the timber growing thereon. We think it is manifest that the last two complaints are not well founded, because the proposed testimony was irrelevant and immaterial. Concerning the statements made by the foreman, Galbreath, there is more room for controversy; but, upon the whole, we have concluded that it was not shown that the statements in question were so coincident with an act which was being done at the time by Galbreath as to constitute them a part of the *res gestæ*, and it is clear that they were not admissible on any other ground. It is most probable, we think, that the statements related to what had been

done previously, and would have proven to be merely narrative of a past transaction, and inadmissible for that reason.

It results from what has been said that the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

United States *vs.* Pine River Logging and Improvement Company, 89 Fed. Rep., 910, 921.